IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GENEVIEVE W. CORCORAN, et al.	:	CIVIL ACTION
v.	:	
BELL ATLANTIC CORP., et al.	:	NO. 97-510

MEMORANDUM

Dalzell, J. September 23, 1997

Nine management employees of Bell Atlantic Corporation ("Bell Atlantic") have filed this putative class action to challenge two amendments of a Bell Atlantic-sponsored pension plan, which they allege violate of the Employee Retirement Income Security Act (hereinafter "ERISA"), 29 U.S.C. §§ 1001-1465. Bell Atlantic has moved to dismiss the amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and we shall, for the following reasons, grant the motion in part and deny it in part.

I. Factual Background

Since 1984, Bell Atlantic has maintained a pension plan for the employees of the company and its subsidiaries. As of 1994, the plan was over-funded -- meaning that the value of plan assets exceeded plan liabilities -- by about $5 billion.

Before the first of its challenged amendments in 1991, the Management Pension Plan[1] (as it was then called) offered two

1. Although plaintiffs note in their response to defendants' motion to dismiss that their version of the Management Pension Plan differs from the text of the plan defendants submitted to us, plaintiffs characterize the difference as "slight," and raise no objection on this basis. Accordingly, we will assume that this minor dispute does not affect our discussion of the

(continued...)

principal forms of pension benefit to eligible employees: a service pension and a deferred vested pension. The service pension provided for eligibility based upon a combination of age and years of service. Before 1991, employees with fifteen or more years of service could retire at age sixty with an unreduced service pension, and employees with twenty or more years of service could retire on or after age fifty-five with an unreduced service pension. A plan participant could also elect to retire in advance of these minimum age thresholds with an actuarially-reduced service pension. Plan participants who did not qualify for a service pension could nevertheless receive the deferred vested pension, which was to commence at the later of age sixty-five or termination of employment.

In addition to the service and deferred vested pensions, there were also various lump-sum cash-out provisions in the pre-1991 plan. Although the exact nature of these provisions remains unclear, it appears that they were offered either to participants whose total potential cash-out was less than $3,500, or who retired on a plan-specified date or within a plan-specified time period.

In 1991, Bell Atlantic amended its pension plan to change the age at which participants could retire at an unreduced service pension. Beginning in 1994, and for every two years thereafter until 2002, the amendment increased by one year the

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1. (...continued)
Management Pension Plan's terms.

minimum age required for an unreduced service pension. Thus, in 1994, the age threshold for an unreduced Service Pension increased to fifty-six; in 1996, it increased to fifty-seven, and so forth. For convenience, we shall call this the “1991 Amendment”.

In 1995, Bell Atlantic renamed and again amended its pension plan (the “1995 Amendment”). The pension plan was converted to a Cash Balance Plan, in which each participant’s pension benefit is stated as a cash account balance.[2] The cash account balance grows like an individual savings account, with monthly company contributions (called “pay credits”) and monthly interest (called “interest credits”). In converting the plan participants’ pension rights under the Management Pension Plan to an opening cash balance under the Cash Balance Plan, Bell Atlantic (i) employed the non-insured unisex pension 1984 mortality factor table (hereinafter “UP-1984 mortality table") without an age set-back,(ii) selected a Pension Benefit Guaranty Corporation (hereinafter “PGBC”) discount rate from September 1995, and (iii) employed the increased age minima instituted in the 1991 Amendment.

Plaintiffs do not quarrel with the decision to adopt a cash balance design, but rather with the process used to

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2. This change in form, of course, does not bring with it a change in function. Notwithstanding the new cash balance design, after the 1995 Amendment the pension plan continued to be a defined benefit pension plan, with identical rights under the law.

implement it. Plaintiffs contend that the defendants selected unfavorable assumptions to value their pre-existing pension rights in the conversion, in violation of the defendants' fiduciary duties under § 404(a) of ERISA, 29 U.S.C. § 1104(a). Plaintiffs also assert that the defendants' 1991 and 1995 Amendments wrongfully reduced a subsidized early retirement benefit, in violation of § 204(g) of ERISA, 29 U.S.C. § 1054(g). Plaintiffs' claims under § 204(g) of ERISA focus upon two separate amendments to the Bell Atlantic Pension Plan.

II. Legal Analysis[3]

We shall first consider plaintiffs' contentions under § 204(g), which, as will be seen, require extended analysis. We will then dispose of the relatively simple fiduciary duty claim contained in Count II of the amended complaint.

A. Violations of § 204(g) of ERISA

Section 204(g) of ERISA provides, in relevant part:

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3. In considering a motion to dismiss made pursuant to Fed. R. Civ. P. 12(b)(6), we must take all allegations contained in the complaint as true and construe them in a light most favorable to the plaintiff. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249, 109 S. Ct. 2893, 2906 (1989); Rocks v. City of Phila., 868 F.2d 644, 645 (3d Cir. 1989). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984); see also Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957); Frazier v. Southeastern Pa. Transp. Auth., 785 F.2d 65, 66 (3d Cir. 1986).

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . . .
> (2) For purposes of paragraph (1), a plan amendment which has the effect of--
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
> (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

29 U.S.C. § 1054(g)(1). Plaintiffs argue that the unreduced service pension was a "retirement-type subsidy" within the meaning of the statute, and that defendants' 1991 Amendment violated § 204(g) of ERISA by increasing the minimum qualification age for the service pension. Second, plaintiffs claim that the 1995 Amendment's calculation of the lump-sum cash-out values ran afoul of § 204(g) by employing (i) the increased age minima instituted by the 1991 Amendment; (ii) the UP-1984 mortality table without an age setback; and (iii) a PGBC discount rate from September 1995 rather than December 1995, all of which having the effect of reducing the "cash-out" value of the plan.

(1) The 1991 and 1995 Amendments and Modification of the Service Pension

It is well-settled, and defendants concede, that the service pension right provided in Bell Atlantic's Management Pension Plan[4] is a "retirement-type subsidy" within the meaning

4. Prior to December 31, 1995, defendants' pension plan was (continued...)

of ERISA § 204(g). See Ashenbaugh v. Crucible Inc., 854 F.2d 1516, 1521 n.6 (3d Cir. 1988) (holding that an early retirement benefit qualifies as a "retirement subsidy" covered under the Act where there is "value in excess of the amount that would be available to a retiring employee under the comparable actuarially-reduced normal retirement benefit provisions"); Richardson v. Pension Plan of Bethlehem Steel, 67 F.3d 1462, 1467-68 (9th Cir. 1995); Costantino v. TRW, Inc., 13 F.3d 969, 977 (6th Cir. 1994); Hunger v. AB, 12 F.3d 118, 120 (8th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 2676 (1994); Harms v. Cavenham Forest Indust., Inc., 984 F.2d 686, 692 (5th Cir.), cert. denied, 510 U.S. 944, 114 S. Ct. 382 (1993); Aldridge v. Lily-Tulip, Inc., 953 F.2d 587, 590 (11th Cir. 1992); Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1410 (2d Cir. 1985), cert. denied, 474 U.S. 1113, 106 S. Ct. 1167, (1986). Thus, §204 (g) of ERISA prohibits the 1991 and 1995 Amendments from having the effect of reducing accrued benefits under the service pension.

Plaintiffs' § 204(g) argument with respect to the service pension is that in both the 1991 and 1995 Amendments defendants "assumed a separation from service occurred" as of the date of the Amendment for the purposes of calculating pension

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4. (...continued)
named the Bell Atlantic Management Pension Plan. With the significant amendments to the plan on that date, the name was changed to the Bell Atlantic Cash Balance Plan. Where the date of the pension plan is relevant to discussion of its provisions, we will use the time-appropriate name.

benefits. Pls.' Mem. Opp'n Mot. Dismiss at 52. Plaintiffs urge instead that they should be allowed, under the terms of the pre-amendment pension plan, to accrue both (i) years of service toward early retirement benefits, as well as (ii) levels of benefits correlating to this additional post-amendment service.

Our Court of Appeals has held that "an employer must provide funding for early retirement benefits if there is the possibility that its employees will 'grow into' these benefits at a date after its early retirement plan is eliminated." Gillis v. Hoechst Celanese Corp., 4 F.3d 1137, 1145 (3d Cir.), cert. denied 511 U.S. 1004 and 511 U.S. 1031 (1993)(emphasis added); see also Dade v. North American Philips Corp., 68 F.3d 1558, 1562 (3d Cir. 1995). Moreover, plaintiffs should "be able to qualify for early retirement benefits at a later date by meeting the plan's pretermination requirements." Id. at 1145-46. Here, although the pension plan was amended and not terminated, the effect under § 204(g) is the same. "Congress intended early retirement benefits to have the same protection in a plan termination that they would have in an amendment." Dade, 68 F.3d at 1563 n.2. It is clear, then, that plaintiffs are entitled to qualify for accrued benefits under the terms of the pre-amendment plan, and that they must be allowed to do so by providing years of post-amendment service.

The second and more difficult issue is the level of benefits to which plaintiffs are entitled if and when they qualify for a service pension under the pre-amendment plan.

Section 204(g) only specifies that it protects "accrued benefits," and plaintiffs and defendants offer differing interpretations of that term. Plaintiffs argue that concomitant with their right to "grow into" their benefits under the pre-amendment plan is their right to see their benefits, as calculated under the pre-amendment plan, grow with them. In other words, upon qualifying for an early retirement service pension at a post-amendment date, plaintiffs believe that they are entitled to a retirement subsidy calculated based on all of their years of service, both before and after the amendments.

Defendants argue that although plaintiffs are allowed to accrue years of post-amendment service to qualify for a service pension under the pre-amendment plan, the benefits to which they are entitled upon qualification should be frozen as of the date of the amendment,[5] i.e., calculated based only on years of pre-amendment service.

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5. Both the 1991 and 1995 Amendments contain "anti-cutback" provisions which protect defendants' interpretation of the level of benefits to which plan participants are entitled under the service pension. The 1995 Amendment, for example, contains the following language:

> Notwithstanding any other provision of this Plan, for any Participant whose 1995 [Bell Atlantic Management Pension Plan] Benefit was converted to an opening balance of a Cash Balance Account on the Transition Date, the Participant's Accrued Benefit shall never be less than the 1995 BAMPP Plan Benefit.

Defs.' Mot. Dismiss at Ex. 1 § 16.4.1. The 1991 Amendment speaks with a similar voice. Id. at App. A § 4.3(c)(3).

Gillis did not specify the amount of benefits that plan participants are entitled to "grow into." Nevertheless, Gillis guides our analysis by pointing to the sources to which we should turn in resolving this question:

> [W]hen interpreting Section 204(g) of ERISA, in addition to the statute's legislative history, we may also look for guidance to sources which interpret its [Internal Revenue Code] counterpart-- Section 411(d)(6). . . .
>
> We give weight to IRS revenue rulings and do not disregard them unless they conflict with the statute they purport to interpret or its legislative history, or if they are otherwise unreasonable.

Gillis, 4 F.3d at 1145 (citations omitted). Therefore, in determining the amount of benefits to which plaintiffs are entitled to qualify under § 204(g), we will examine the statute's legislative history as well as relevant IRS revenue rulings.

The Senate Report accompanying the Retirement Equity Act of 1984 (hereinafter "REA"),[6] squarely addresses the issue before us. See S. Rep. No. 98-575, at 29 (1984), reprinted in 1984 U.S.C.C.A.N. 2547, 2574-75. The Report describes a hypothetical situation, quite pertinent to our problem, in which an annuity form pension plan that provides for an unreduced early retirement pension is amended to impose an early retirement reduction, i.e., the retirement subsidy is eliminated:

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6. The REA amended § 204(g) of ERISA to protect early retirement benefits and retirement-type subsidies.

> Under this plan, if a participant did not meet the plan's requirements for unreduced early retirement benefits on [the date of amendment], but the participant later satisfies those requirements, then the participant's accrued benefit under the plan would be the greater of (1) the accrued benefit as of the date of the plan amendment, without taking the actuarial reduction into account, or (2) the accrued benefit provided by the plan when the benefit becomes payable, after the full actuarial reduction. Accordingly, the participant's accrued benefit will not be reduced by the plan amendment, but it will not be increased by subsequent service or pay raises until the subsequent increase brings the participant's accrued benefit to a level in excess of the accrued benefit as of [the date of amendment].

Id. at 2575 (emphasis added). Under the terms of the Senate Report, therefore, § 204(g) guarantees that the plan participant will be entitled to the greater of (i) the benefit that had accrued as of the date of the amendment, taking account of any pre-amendment subsidies that the participant was eligible to receive based on his or her age and service as of the date of separation (under the terms of the pre-amendment plan), or (ii) the benefit under the post-amendment benefit formula which is in place when the employee stops working for Bell Atlantic. The Senate Report does not, however, assure that post-amendment years of service will be included in calculating benefits under the pre-amendment plan. Indeed, the Senate Report's language quoted above precludes plaintiffs' construction of § 204(g).

Our examination of IRS revenue rulings does not disturb our legislative history-based conclusion. There is no revenue ruling which directly addresses the amount of benefits to which

plan participants are entitled in this situation. The revenue ruling which our Court of Appeals relied upon in Gillis, however, itself refers to the Senate Report cited above for its own analysis. See Gillis, 4 F.3d at 1145 (citing Rev. Rul. 85-6, 1985-1 C.B. 133). Thus, because the IRS also turned to the Senate Report for guidance in interpreting § 204(g), no inconsistency exists between the revenue rulings and the legislative history just considered.

Furthermore, we are mindful of the fact that, under the very language of § 204(g), only plan amendments which eliminate or reduce retirement-type subsidies "with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits." 29 U.S.C. § 1054(g)(2)(A). Pension plans may, of course, extend the accrual of post-amendment benefits beyond the minimum terms ERISA guarantees. The extent to which they decide to do so, however, is beyond the purview of this Court's ERISA review. See Dade, 68 F.3d at 1564 (holding that "a sponsoring employer . . . is free to define the benefits in its ERISA plan and that those definitions must be enforced as written in the absence of a contrary statutory mandate"); cf. Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1162 (3d Cir. 1990) (enumerating "ERISA's detailed accrual and vesting provisions" and the fact that "employees and their unions remain free to bargain for vesting requirements in the terms of their plans above and beyond those required by statute" as separate limitations on an employer's discretion to amend or terminate

benefit plans). Here, there is no evidence that defendants intended to extend early retirement benefits beyond the legal minimum ERISA guarantees. Indeed, the language of the 1991 and 1995 Amendments' "anti-cutback" provisions appears to assure no more than is statutorily required. To the extent that plaintiffs argue that they have been unjustly denied accrued benefits to which they are currently entitled and which the present Cash Balance Plan guarantees, their claim is one which seeks an interpretation of a plan rather than constitutes a protest of its amendment. To that extent, plaintiffs must first exhaust the plan's internal claims procedures, see Zipf v. American Tel. & Tel. Co., 799 F.2d 889, 891-93 (3d Cir. 1986); Wolf v. National Shopmen Pension Fund, 728 F.2d 182, 185 (3d Cir. 1984), which they have not done.

Finally, our conclusion that plaintiffs are entitled to "grow into" their early retirement subsidy for the purposes of qualifying for, but not calculation of, that subsidy is consistent with the spirit of ERISA itself. "Employers . . . are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. ___, 115 S. Ct. 1223, 1228 (1995). "'ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued.'" Wise v. El Paso Natural Gas Co., 986 F.2d 929, 935 (5th Cir.) (quoting Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986), cert. denied, 481 U.S. 1016, 107 S.

Ct. 1893 (1987)), cert. denied, ___ U.S. ___, 114 S. Ct. 196 (1993); see also Dade, 68 F.3d at 1561 (3d Cir. 1995) ("ERISA does not mandate the creation of pension plans. Nor . . . does it dictate the benefits to be afforded once a decision is made to create one.") (citing Hlinka v. Bethlehem Steel Corp., 863 F.2d 279, 283 (3d Cir. 1988)). Instead of amending the pension plan in 1991 and 1995, Bell Atlantic under ERISA could lawfully have "frozen" the plan by completely eliminating any future accrual or increase of benefits under the plan. While this did not happen, the reality that a "freeze" was within defendants' lawful discretion underscores the central concern of ERISA here: the only accrued benefits which § 204(g) protects are those based on years of service already rendered at the time of the amendment.

The anti-cutback provisions in both the 1991 and 1995 Amendments protect the plaintiffs' pre-amendment pension plan rights in conformity with our interpretation of § 204(g). Therefore, there is no set of facts which plaintiffs could plead that would entitle them to relief based upon this claim.

(2) The 1995 Amendment and Calculation of the Lump-Sum Cash-Out Values

As with our consideration of the amendment of the service pension above, before we reach plaintiffs' substantive allegations we must first determine whether the lump-sum cash-out option in the 1995 Amendment was a retirement-type subsidy § 204(g) protects. Plaintiffs argue that § 204(g) should apply

based on the fact that "at or about the time when changes to the Management Pension Plan to create the Cash Balance Plan first began to receive serious consideration at Bell Atlantic, the only provision in the Management Pension Plan for calculation of a lump-sum cash-out provided for calculation" of the benefit using mortality and discount rate assumptions more generous than those in the 1995 Amendment. Pls.' Am. Compl. at 27. In other words, plaintiffs allege that (i) the pre-amendment Management Pension Plan contained a lump-sum cash-out provision which used certain mortality and discount assumptions; (ii) the 1995 Amendment substituted less favorable mortality and discount assumptions in calculating the lump-sum cash-out option under the Cash Balance Plan; and (iii) this resulted in an impermissible reduction of an accrued benefit under § 204(g).

Defendants admit that lump-sum cash-out provisions existed in the Management Pension Plan at the time it was amended. They argue, however, that the character of the pre-amendment lump-sum cash-out provisions places them outside the ambit of § 204(g). Defendants contend that the lump-sum cash-out was never a permanent feature of the plan, having only been introduced as an incentive for early retirement during three separate and discrete "window periods."[7] Defendants construe §

7. The first required participants to retire on December 15, 1991 (referred to in the plan as the "window date"); the second required retirement between September 1, 1992 and January 28, 1993 (referred to as "1992-1993 Pension Cash-Out Window"); and the third required retirement between December 31, 1993 and (continued...)

204(g) to apply only to permanent features of a pension plan, and not to temporary or "window period" benefits. On that basis, they believe that § 204(g) should not apply.

Plaintiffs did not specify the lump-sum cash-out provisions in the pre-amendment Management Pension Plan upon which they relied.[8] Pls.' Am. Compl. at ¶39. Our own review of the Management Pension Plan, submitted as an exhibit with defendants' motion to dismiss,[9] leads us to conclude that the only pre-amendment provisions in the pension plan which contained a lump-sum cash-out option were those defendants have

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7. (...continued)
December 31, 1995 (referred to as "1994-1995 Pension Cash-Out Window").

The pre-amendment pension plan also contained a lump-sum cash-out option for participants whose present value of accrued benefits was under $3,500 at the time of their retirements. See Defs. Mot. Dismiss at App. A § 4.7(d). Because of the benefit cap, this provision is not relevant to our consideration of whether the 1995 Amendment violated ERISA, and neither side relies on it as such.

8. In plaintiffs' memorandum of law in opposition to defendants' motion to dismiss the amended complaint [hereinafter "plaintiffs' reply"], plaintiffs aver that the 1991 Amendment and 1995 Amendment "present identical issues," Id. at 52, which perhaps explains why they failed to respond to defendants' contention that the lump-sum cash-out is outside the scope of § 204(g)'s protection.

9. Federal Rule of Civil Procedure 12(b)(6) allows us to consider any "'undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document.'" In re Donald J. Trump Casino Secs. Litig., 7 F.3d 357, 368 n.9 (3d Cir. 1993) (quoting Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied, 510 U.S. 1042 (1994)), cert. denied, 510 U.S. 1178 (1994); see also In re Westinghouse Secs. Litig. 90 F.3d 696, 707 (3d Cir. 1996). The parties' do not seriously contend that the documents defendants submitted with their motion to dismiss are suspect. See supra, note 2.

named, i.e., the three discrete early retirement window periods. Mindful, however, of the latitude which we must give plaintiffs' allegations under Fed. R. Civ. P. 12(b)(6), we are reluctant to rely for all time on our reading of the Management Pension Plan as the basis for plaintiffs' claim, and thus are unable yet to conclude that there is no set of facts under which plaintiffs might show that, with respect to the lump-sum cash-out option, the 1995 Amendment to the pension plan reduced accrued benefits. We shall nevertheless assume for our analysis that the three "window period" lump-sum cash-out provisions defendants have cited are the only provisions in the pension plan at issue here.

Assuming that the question of whether "window period" benefits are a protected part of the pension plan is properly before us, we first turn for our answer to the statute. The plain language of § 204(g) does not specify whether it protects against the reduction or elimination of temporary or "window period" benefits. Our approach is thus again driven by the methodology suggested in Gillis: we shall examine both legislative history and relevant IRS revenue rulings as the basis for our analysis. See 4 F.3d at 1145.

Fortunately, the same Senate Report to which we referred earlier is again directly on point:

> [T]he bill makes it clear that the prohibition against reduction of a benefit subsidy . . . applies to a participant only if the participant meets the conditions imposed by the plan on the availability of the subsidy. . . . Accordingly, if a benefit subsidy is provided, for example, only for employees who retire during a

> "window period", the provision would not require that benefits of an employee who does not retire during the window period include the window benefit.

S. Rep. No. 98-575, at 29 (1984), reprinted in 1984 U.S.C.C.A.N. 2547, 2574. It appears, then, that Congress intended to limit "window period" benefits only to those who elected to retire within such periods. Such times therefore cannot be considered a permanent part of the plan protected by § 204(g) from reduction or elimination by plan amendment.

The revenue rulings reach the same conclusion. Revenue Ruling 92-66 squarely addresses the question of "window period" benefits, and holds that ERISA's companion provisions in the Internal Revenue Code "do not require that an early retirement window benefit be provided permanently to all employees under a plan when the employer amends its plan to make the benefit available for substantially consecutive, limited periods of time . . . ." 1992-2 C.B. 92, 94.

We also note that the few courts which have considered this issue have held that § 204(g) does not protect "window period" benefits from later reductions or elimination by amendment. See Bass v. Retirement Plan of Conoco, Inc., 676 F.Supp. 735, 747 (W.D.La. 1988) (citing S. Rep. No. 98-575, reprinted in 1984 U.S.C.C.A.N. 2547, 2574-75)(holding that "window period benefits do not enter into the determination that an accrued benefit was eliminated or reduced in violation of [section 204(g)] unless (1) the claimant was entitled to the

benefit, (2) the benefit was accrued, and (3) the accrued benefit was subsequently eliminated or reduced"); DeCarlo v. Rochester Carpenters Pension, 823 F.Supp. 115, 119-20 (W.D.N.Y. 1993)(holding that payment of a "one-time" benefit in five out of six prior years did not constitute a "permanent benefit" protected by ERISA).

Thus, the limited case law supports our Gillis-type analysis and conclusion that "window period" benefits are not considered permanent benefits that § 204(g) protects.

Our Gillis inquiry is not at an end, however. Revenue Ruling 92-66 also recognized that allowing window benefits to escape the purview of § 411(d) of the Internal Revenue Code (counterpart to § 204(g) of ERISA) creates a potential loophole for employers, in that they could achieve exemption from the Code -- and, by extension, from ERISA -- merely by breaking down an otherwise permanent benefit into a continuous series of temporary window benefits. In response, the IRS ruled:

> [I]f an employer establishes a pattern of repeated plan amendments providing for similar benefits in similar situations for substantially consecutive, limited periods of time, such benefits will be treated as provided under the terms of the plan, without regard to the limited periods of time, to the extent necessary to carry out the purposes of [the IRC].

Rev. Rul. 92-66, 1992-2 C.B. 92, 94 (citing Treas. Reg. § 1.411(d)-4, Q&A-1(c)(1)). Such a determination is to be made

> on the basis of the facts and circumstances. Although no one particular fact is determinative, relevant factors include: (i) whether the amendments are made on account of a specific

> business event or condition; (ii) the degree to which the amendment relates to the event or condition; and (iii) whether the event or condition is temporary or discrete or whether it is a permanent aspect of the employer's business.

Id. At least one other federal court has adopted this test. See DeCarlo, 823 F.Supp. at 119-20.

We agree with the IRS that such an inquiry is necessary in order to keep employers from dressing the wolf in sheep's clothing. Mindful also of our Court of Appeals's admonition to give weight to IRS revenue rulings, we therefore adopt the Service's test. Thus, if we were to decide that the (assumed) thrice-repeated offering of early retirement lump-sum cash-out benefits by Bell Atlantic were, indeed, temporary plan benefits, we would then have to decide whether those provisions constituted such an impermissible "repeated pattern of plan amendments" within the meaning of the IRS test.

On the basis of the record before us, however, we are unable at this time to identify and evaluate the exact nature and character of the lump-sum cash-out benefits in the pre-amendment plan. We therefore decline to dismiss this aspect of plaintiffs' § 204(g) claim on the present record.

Although we have permitted discovery to continue during pendency of this motion, we will nevertheless afford the parties an additional thirty days to close any gaps in the record, or correct any misapprehension on our part. At the conclusion of this discovery, defendants may renew their argument on this point in the dress of a Rule 56 motion.

B. Violations of fiduciary duty under §§ 404 of ERISA

Section 404(a) of ERISA provides, in relevant part:

> (1) [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . .

29 U.S.C. § 1104(a).

Bell Atlantic has always been both the plan sponsor and plan administrator of the pension plan. There is nothing improper or even unusual about this business arrangement. Employers often keep their pension plans "in-house." The mere fact that an employer is both sponsor and administrator of the plan does not require that all actions it takes with regard to the pension plan be subject to fiduciary scrutiny under § 404. "'[W]hen employers wear 'two hats' as employers and as administrators . . . they assume fiduciary status only when and to the extent that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA.'" Curcio v. John Hancock Mut. Life. Ins. Co., 33 F.3d 226, 234 n.10 (3d Cir. 1994)(quoting Payonk v. HMW Indus., Inc., 883 F.2d 221, 225 (3d Cir. 1989) (citations omitted)). Thus, our threshold inquiry is whether Bell Atlantic acted as plan sponsor -- and thus non-fiduciary -- or plan

administrator -- and thus fiduciary -- when it amended the pension plan in 1991 and 1995.

In Lockheed Corp. v. Spink, ___ U.S. ___, 116 S. Ct. 1783, 1789 (1996), the Supreme Court recently held that an employer becomes a "fiduciary" within the meaning of ERISA[10] "only when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration . . . ." (internal quotations omitted). Lockheed further held that "the act of amending a pension plan does not trigger ERISA's fiduciary provisions. Id. at 1790; see also Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1161 (3d Cir. 1990)(holding in accord and noting that "[v]irtually every circuit has rejected the proposition that ERISA's fiduciary duties attach to an employer's decision whether or not to amend an employee benefit plan").

In light of the Supreme Court's clear holding on this issue, we have little trouble in finding that plaintiffs' fiduciary claims must fail as a matter of law. Plaintiffs here

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10. Section 3 of ERISA defines the term "fiduciary" as follows, in relevant part:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan . . . .

29 U.S.C. § 1002(21)(A).

are alleging that amendment of Bell Atlantic's pension plan violated fiduciary duties. Lockheed to the contrary squarely holds that amendment of a pension plan is not subject to fiduciary scrutiny under ERISA.

An Order follows.